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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. VIRGINIA DEVERA, Defendant and Appellant.	B168247 (Los Angeles County Super. Ct. No. NA055758)
In re VIRGINIA DEVERA, on Habeas Corpus.	B173170

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed as modified. The petition for writ of habeas corpus is denied.

Maria Morrison, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Virginia Devera appeals from a judgment after jury trial in which she was convicted of possession for sale of methamphetamine (Health & Saf. Code, § 11378) and maintaining a place for the sale or use of methamphetamine (Health & Saf. Code, § 11366). Defendant seeks independent review of in camera proceedings relating to a sealed search warrant affidavit. Defendant also contends: the trial court erred in admitting evidence of a scale and baggies; the trial court erred in denying her motion for acquittal at the close of the prosecution's case-in-chief; insufficient evidence exists to support her conviction for maintaining a place for the sale or use of methamphetamine; the prosecutor engaged in misconduct in argument to the jury; and the trial court erred in failing to stay under Penal Code section 654 her sentence for maintaining a place for the sale or use of methamphetamine. The prosecution contends the trial court erred in failing to impose certain penalty assessments. In a petition for writ of habeas corpus we consider concurrently with the appeal, defendant contends the trial court denied her right to an interpreter. We modify the judgment to impose the penalty assessments and affirm the judgment as modified. We summarily deny the petition for writ of habeas corpus.

PROCEDURAL BACKGROUND

Defendant and codefendant Rufino Edillor were charged by information with possession for sale of methamphetamine, defendant was charged with maintaining a place for the sale or use of methamphetamine, and codefendant Edillor was charged with using a fortified house for the sale or possession of methamphetamine. (Health & Saf. Code, § 11366.6.) Codefendant Edillor pleaded guilty to possession for sale of methamphetamine, and the case proceeded to trial against defendant alone. The jury convicted defendant as charged. Defendant was sentenced to the middle term of two years for possession for sale of methamphetamine and a concurrent middle term of two years for maintaining a place for the sale or use of methamphetamine.

Defendant filed a timely notice of appeal. Simultaneous to the filing of her opening brief on appeal, defendant filed a petition for writ of habeas corpus. We elected to consider the petition concurrently with the appeal.

FACTS

At 6:30 p.m. on January 20, 2003, police executed a search warrant at a four-bedroom house where defendant lived with at least two other tenants. Eighteen people were found in the house, some of whom were smoking methamphetamine. Six people were arrested as the result of this search.

Defendant was found in her bedroom with three other people, two of whom had methamphetamine pipes. Defendant was lounging on her bed. Near defendant on her bed was a glass methamphetamine pipe, $35 in cash, and three baggies: a pink baggie containing .14 grams of a substance containing methamphetamine; a pink baggie containing residue which was not tested by the laboratory; and a clear baggie containing an off-white substance resembling methamphetamine, but which was not, in fact, a controlled substance. Defendant's purse was also near her on the bed. Her purse contained an identification card indicating she lived at the house.

Defendant was taken outside the house and searched. In her vest pocket, police found a clear plastic baggie containing a short straw and .65 grams of a substance containing methamphetamine.

In codefendant Edillor's bedroom, police found a gram scale and a package of one-inch square baggies.[1] There were five people in codefendant Edillor's bedroom, and codefendant Edillor was in possession of two baggies containing a substance that appeared to be methamphetamine.

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[1] There was no evidence codefendant Edillor kept his bedroom locked, or that the tenants were otherwise prevented from accessing each other's rooms.

Long Beach Police Department Officer Gregory Roberts, one of the officers who had conducted the search, testified as an expert in the field of narcotics. He testified as follows. The gram scale was of the type frequently used to weigh drugs for sale, and the baggies were of the type used to package methamphetamine. It was often common to have a large number of people in a house used for methamphetamine sales or use. A regular $5 dose of methamphetamine is .05 grams, so defendant possessed approximately 16 doses. Some people who use methamphetamine also sell it, to support their habit. Given the amount of methamphetamine possessed by defendant, the presence of a scale and baggies in her home, and the large amount of traffic in the house Officer Roberts opined defendant possessed methamphetamine for sale. Additionally, a piece of metal was bolted to the door, preventing it from being opened. The use of such a barricade is common where methamphetamine is sold, but not where it is merely used.

Defendant testified in her defense, stating that she was a user, not a seller, of methamphetamine. She testified she did not rent the whole house, but only one of the four bedrooms. She had loaned her house key to a friend while she went out for the day, and when she returned, she found the people in her bedroom. When she came home, she bought a baggie of methamphetamine for $20 from one of the tenants. This was the baggie found in her vest pocket. She did not own the methamphetamine, the pipe, or the other baggies found next to her on the bed.

In rebuttal, Officer Roberts testified defendant had told him she was the "primary renter" of the house and subleased the other bedrooms to the other tenants.

DISCUSSION

I. Sealed Search Warrant Affidavit

The search of defendant's house was in accordance with a search warrant issued on the basis of a sealed affidavit. At the preliminary hearing, defendant filed a motion to

quash the search warrant. The motion was based on two grounds: whether the sealed search warrant affidavit provided probable cause for the search; and whether any portion of the search warrant affidavit should be unsealed. An in camera proceeding was held. The magistrate concluded probable cause was established and the search warrant affidavit should not be unsealed. After defendant was arraigned, she filed a motion to suppress with the trial court, where she asserted the execution of the search warrant violated the knock/notice requirement. This motion was denied.

Defendant seeks review of the magistrate's rulings at the preliminary hearing denying defendant's motion to quash. Defendant did not reassert this motion before the trial court. Defendant's motion to suppress at the trial court level was specifically limited to the issue of the knock/notice requirement and did not reassert the issues of probable cause or sealing the search warrant affidavit.

The contention has therefore been forfeited. A defendant must reassert a motion to quash at the trial court level in order to preserve the issue for appellate review. (*People v. Hoffman* (2001) 88 Cal.App.4th 1.) This also holds true for the motion to unseal. (See *People v. Hobbs* (1994) 7 Cal.4th 948, 956-957 [motion to unseal is part of the motion to quash].) We therefore decline to review the magistrate's rulings.

Were the contention not forfeited, we would still be unable to review it as the appellate record is inadequate. It is the appellant's burden to provide a record affirmatively showing error. (*People v. Green* (1979) 95 Cal.App.3d 991, 1001.) The sealed search warrant affidavit at issue is not a part of the appellate record. We have obtained the superior court file, which includes the proceedings before the magistrate.[2] The sealed search warrant affidavit is not in the superior court file. We therefore cannot review it.

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[2] We take judicial notice of the superior court file.

II. The Scale and Baggies

Defendant contends the trial court erred in admitting the scale and baggies into evidence, in that they were found in codefendant Edillor's bedroom, not hers.

Before trial, the prosecutor sought a hearing on the admissibility of the scale. The prosecutor acknowledged the scale had been found in codefendant Edillor's bedroom, but sought its admission on the basis that defendant had admitted to police that she was the primary tenant of the house. Defendant argued the scale was not admissible because there was nothing tying her to it. The trial court concluded the scale was admissible and the issue of its location concerned the weight, not admissibility.

Defense counsel then asked the trial court if everything found in codefendant Edillor's room was therefore admissible. The prosecutor replied he was only concerned with the scale. Defense counsel then stated, "I'm going to ask that everything that was found in his room be admissible." Defense counsel specifically indicated an intention to introduce the baggies. In his opening statement to the jury, the prosecutor mentioned only the scale. Defense counsel made an opening statement in which she represented the scale and baggies had been found in codefendant Edillor's bedroom. The prosecution then introduced evidence the scale and baggies were found in codefendant Edillor's bedroom. Defendant did not object.

On appeal, defendant contends the trial court erred in admitting evidence of the scale and baggies, in that the evidence was irrelevant (Evid. Code, § 351) and the prejudicial value of the evidence outweighed its probative value (Evid. Code, § 352).

To the extent defendant contends that the trial court erred in ruling the baggies admissible, we conclude the contention has been forfeited. The prosecution sought and obtained a pretrial ruling on the admissibility of only the scale. Defense counsel then indicated an intention to introduce the baggies, mentioned the baggies in her opening statement, and did not object when the prosecutor introduced evidence of the baggies. Having failed to object, defendant cannot raise this issue on appeal. (Evid. Code, § 353.)

This is also true with respect to defendant's argument that the probative value of the scale is outweighed by the possibility of undue prejudice under Evidence Code section 352. Defendant objected only on the ground of relevance, not Evidence Code section 352. A defendant relying on Evidence Code section 352 must move to exclude the evidence under that section. (*People v. Smith* (1984) 151 Cal.App.3d 89, 97.) "In the absence of an objection based on Evidence Code section 352, or a specific request for the court to exercise the discretion granted to it by that section, we hold that the trial court was not required 'to make *sua sponte* an affirmative finding on the record to the effect that the probative value of the proffered evidence outweigh[ed] its prejudicial effect.'" (*Ibid.*)

Defendant's remaining contention is that the scale found in codefendant Edillor's bedroom was irrelevant. We disagree. Defendant was charged with maintaining a place for the sale or use of methamphetamine. The prosecution offered evidence that defendant was the primary tenant of the house, and sublet the other bedrooms. There was no evidence that the bedroom doors were locked or that defendant did not have access to the entire house. That defendant sublet a bedroom to codefendant Edillor, who possessed a gram scale used for the weighing and packaging of methamphetamine for sale, is clearly relevant to this count. The evidence of the scale was therefore admissible.

III. Motion for Acquittal

Defendant contends the trial court erred in denying her motion for acquittal on the count of possession for sale of methamphetamine.

In the prosecution's case in chief, the prosecution introduced all of its evidence except defendant's admission she was the primary tenant of the house. Defendant moved for acquittal on the count of possession for sale of methamphetamine under Penal Code section 1118.1. The trial court denied the motion.

"When reviewing the denial of a motion to acquit for insufficient evidence made at the close of the prosecution's case, we consider only the evidence then in the record." (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1464.) "'Unlawful possession of a controlled substance for sale requires proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character. [Citation.]' [Citations.] Intent to sell may be established by circumstantial evidence." (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) "'[E]xperienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld.'" (*People v. Parra* (1999) 70 Cal.App.4th 222, 227.) "[I]t is for the jury to credit such opinion or reject it." (*People v. Harris, supra,* 83 Cal.App.4th at p. 375.)

There is no dispute the prosecution introduced sufficient evidence defendant knowingly possessed methamphetamine. Defendant disputes only whether the prosecution introduced sufficient evidence of intent to sell. Defendant argues that the prosecution's only evidence of intent to sell was Officer Roberts's opinion, and this opinion must be rejected as insufficient because it was based on the scale and baggies found in codefendant Edillor's bedroom without any evidence defendant had access to these items.

Defendant's argument is factually incorrect. The prosecution introduced other evidence of intent to sell. First, the door to the house was barricaded, which Officer Roberts indicated was evidence of sales. Second, defendant possessed a substance that appeared to be methamphetamine but was not a controlled substance, indicating defendant possessed a cutting agent with which to mix methamphetamine for sale.[3]

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[3] Officer Roberts testified at the preliminary hearing that this substance "appeared to be a possible cutting agent." While he offered no such testimony at trial, the jury could have drawn a similar inference.

Thus, even without Officer Roberts's opinion, there was sufficient evidence of possession for sale.

In any event, the jury was not barred from considering Officer Roberts's opinion, even though it was based, in part, on the scale and baggies found in codefendant Edillor's bedroom. At the time of defendant's motion for acquittal, the jury had heard evidence defendant and codefendant Edillor lived in the house, the front door of the house was barricaded, and eighteen people had been found in the house engaging in activity related to the use of methamphetamine. The jury could reasonably infer that defendant and codefendant Edillor had not independently decided to host simultaneous methamphetamine parties in their respective bedrooms, but were in fact working together in the sale of methamphetamine in the house. There was, therefore, a reasonable basis for the jury to conclude defendant had access to the methamphetamine sales paraphernalia in codefendant Edillor's bedroom. Accordingly, Officer Roberts's opinion was well-supported.

IV. Maintaining a Place for Sale or Use

Defendant contends there is insufficient evidence to support her conviction for maintaining a place for the sale or use of methamphetamine.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) '"Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]"' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Health and Safety Code section 11366 prohibits the maintaining of a place for the sale or use of methamphetamine. "'[I]t can be violated without selling, merely by providing a place for drug abusers to gather and share their experience.'" (*People v. Vera* (1999) 69 Cal.App.4th 1100, 1102.) Health and Safety Code section 11366 "is aimed at places intended to be utilized for a continuing prohibited purpose, and a single or isolated instance of misconduct does not suffice to establish a violation." (*Ibid.*) A violation of Health and Safety Code section 11366 can be proven by evidence of a single instance of misconduct, however, if "additional 'circumstances surrounding' the proscribed conduct" establish the offense. (*People v. Roeschlaub* (1971) 21 Cal.App.3d 874, 878; *People v. Shoals* (1992) 8 Cal.App.4th 475, 491.)

Here, the evidence is sufficient to establish defendant, as the primary tenant, maintained the house for the sale or use of methamphetamine. Although the evidence indicated only a single evening of drug use by many individuals, the circumstances give rise to the conclusion it was not an isolated incident. The front door of the house was permanently barricaded, indicating methamphetamine sales were a repeating occurrence at the house. Codefendant Edillor possessed a scale and baggies, indicating he regularly prepared methamphetamine for sale. Indeed, defendant testified that another subtenant

sold methamphetamine in the house. The evidence is therefore sufficient to support the conclusion defendant maintained the house for the sale and use of methamphetamine.

Defendant does not dispute this conclusion, but instead argues the evidence was insufficient to support the conclusion she maintained *her bedroom* for the sale or use of methamphetamine, and the jury rested its conclusion on this theory. During deliberations, the jury submitted a question asking the trial court, "Is it sufficient that defendant open and maintain her bedroom or did she have to open and maintain the entire house?" The trial court advised the jury that the bedroom was sufficient. Defendant therefore infers that the jury found her guilty of maintaining her bedroom only, and argues the evidence is insufficient to support the conviction on this basis. Specifically, defendant argues there is no evidence in the record suggesting defendant's bedroom alone was used for methamphetamine sales or use on more than a single occasion.

But the same evidence which would support a finding of continuing conduct with respect to the house also supports a finding of continuing conduct with respect to defendant's bedroom. Even if the jury found defendant guilty based on maintaining her bedroom alone for the sale or use of methamphetamine, such a conclusion would not compel the rejection of all of the evidence located outside defendant's bedroom. Defendant was the primary tenant of the house. The front door of the house was barricaded, indicating repeated sales of methamphetamine occurred at a location protected by that door. As such, the barricaded front door combines with the single incident of possession for sale of methamphetamine in defendant's bedroom to support the conclusion defendant maintained her bedroom for the sale or use of methamphetamine. Likewise, the scale and baggies found in codefendant Edillor's room also support the conclusion defendant maintained her bedroom for the sale or use of methamphetamine. The significance of the scale and baggies is their indication of the continued packaging of methamphetamine for sale. Defendant had access to that scale and baggies. That the scale and baggies were located outside of defendant's bedroom at

the time they were seized by police does not mean they are completely irrelevant to any activity the defendant may have conducted in her bedroom.

We therefore conclude the evidence supports the jury's conclusion defendant maintained a place for the sale or use of methamphetamine, whether the jury based its conclusion on the entire house or defendant's bedroom.

V. Prosecutorial Misconduct

Defendant contends the prosecutor engaged in misconduct in his closing argument to the jury.

In defendant's argument, defense counsel attempted to raise a reasonable doubt by focusing on purported weaknesses in the prosecution's case. In closing argument, the prosecutor responded by characterizing defense counsel's argument as raising four points, and then addressing each point. First, the prosecutor addressed defense counsel's contention that defendant used methamphetamine but did not sell it. After raising two flaws with this argument, the prosecutor said, "So I don't think that argument holds water." The prosecutor next addressed defense counsel's contention defendant possessed a quantity of methamphetamine too small for sale. After addressing that argument, the prosecutor stated, "So the amount being too small, I think, is not an argument that holds water." Defendant did not object to either of these statements.

The prosecutor then addressed defense counsel's argument that defendant's testimony undermined the prosecution's case. The prosecutor argued as follows:

"[The prosecutor]: The defense also asks you in their third prong of their defense to rely on the statement of the defendant on the stand. You saw her testimony and, frankly, it makes me a little uncomfortable because I'm from the Philippines too and, frankly, she looks a lot like my mom, and so I don't really know how to delve into what she said because I felt very uncomfortable cross-examining her.

"[Defense counsel]: Objection; improper closing.

"The Court: You may continue with your argument.

"[The prosecutor]: But the point is, I don't want to call her a liar just right out, but you saw her testimony. It's not reliable –

"[Defense counsel]: Your honor, objection; improper closing.

"The Court: You may continue.

"[The prosecutor]: It wasn't reliable testimony, and I don't think it holds water either."

Defendant contends the prosecutor's argument improperly implied that the prosecutor had reasons not presented to the jury to personally believe defendant's testimony didn't "hold[] water," based on their common ancestry, and that although the prosecutor did not cross-examine defendant as rigorously as he could have, the jury should just take his word for the fact defendant's testimony was unreliable. We disagree.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] . . . [W]hen the claim focuses upon comments made by a prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Prosecutorial misconduct will not result in a reversal unless it is reasonably probable that a result more favorable to the defendant would have been obtained in the absence of the misconduct. (*People v. Milner* (1988) 45 Cal.3d 227, 245.)

"In most of the complained-of instances the prosecutor merely used the pronoun 'I' in his comments. Such phraseology hardly establishes impermissible expression of personal belief in the defendant's guilt. [Citation.] Examination of the prosecutor's

closing argument demonstrates that he was merely presenting his views of the deductions and inferences warranted by the evidence." (*People v. Allison* (1989) 48 Cal.3d 879, 894.)

In this case, the prosecutor never stated he held back in cross-examining defendant, only that he felt uncomfortable. Nor did the prosecutor suggest that his disbelief of defendant's testimony arose from anything outside the testimony. Indeed, the prosecutor specifically stated, "[Y]ou saw her testimony. It's not reliable." Finally, the prosecutor's statement that he did not think defendant's testimony "holds water," was clearly not an expression of personal opinion, but simply the prosecutor's way of stating that this argument of defense counsel, like the other arguments addressed earlier in the prosecutor's closing, was not persuasive. There is no reasonable likelihood the jury construed this statement as implying the prosecutor had knowledge outside the evidence presented to the jury of defendant's unreliability.

VI. Penal Code section 654

Defendant received concurrent sentences for possession for sale of methamphetamine and maintaining a place for the sale or use of methamphetamine. Defendant contends the latter sentence should have been stayed under Penal Code section 654.

Penal Code section 654, subdivision (a) provides in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "Penal Code section 654 precludes multiple punishment where several crimes are committed during an indivisible course of conduct with a single criminal objective. On the other hand, multiple punishment is permissible if the defendant entertained multiple criminal objectives which were independent of and not merely

incidental to each other." (*People v. Green* (1988) 200 Cal.App.3d 538, 543.) "Whether a course of criminal conduct violating more that one penal statute is committed with a single criminal intent or with multiple criminal objectives is ordinarily a question of fact for the trial court, whose implied finding of multiple criminal intent will be upheld if supported by substantial evidence." (*Id.* at pp. 543-544.)

Defendant argues that both offenses had the same criminal intent: to sell methamphetamine. We disagree. While the offense of possession for sale of methamphetamine clearly implicates defendant's intent to sell methamphetamine, the offense of maintaining a place for the sale or use of methamphetamine does not. The evidence shows defendant's intent in maintaining the house was not just to sell methamphetamine, but to enable *others* to have a protected place to sell methamphetamine. In addition, the evidence is susceptible of an interpretation that the house was used not only to sell methamphetamine but also as a place for users to congregate. As there are different intents involved in selling methamphetamine and providing a safe place for others to sell methamphetamine, and in selling and providing a place to use methamphetamine, multiple punishments are not prohibited by Penal Code section 654.

VII. Penalty Assessments

Defendant was ordered to pay a $50 laboratory analysis fee. (Health & Saf. Code, § 11372.5) The prosecution contends the trial court erred in failing to impose a $50 state penalty assessment (Pen. Code, § 1464) and a $35 county penalty assessment (Gov. Code, § 76000), with respect to this fee. The prosecution further contends the abstract of judgment must be modified to reflect the penalty assessments. We agree. (*People* v. *Martinez* (1998) 65 Cal.App.4th 1511, 1520-1523.)

VIII. Petition for Habeas Corpus

Defendant filed a petition for habeas corpus on the basis that she was improperly denied an interpreter at trial.

A. Proceedings

On March 6, 2003, defendant appeared for arraignment in superior court. The court clerk informed the trial court that defendant "might need the interpreter." The following colloquy then occurred:

"The Court: Have you talked to her?

"[Defense counsel]: Yes, numerous times. I have gone to the jail and talked to her. Maybe it's the other.[4] We don't need an interpreter. [¶] [Defendant,] do you need an interpreter?

"[Defendant]: Not really, I understand.

"The Court: Do you understand English?

"[Defendant]: Yeah."

No interpreter was appointed.

The issue was not raised again until May 2, 2003, the date scheduled for the hearing on defendant's motion to suppress. The parties and court agreed to continue the matter. Before the trial court took the necessary time waiver, defense counsel stated, "If you recall, [defendant] requires the Tagalog interpreter." The trial court put the matter on second call in order to "find out about" a Tagalog interpreter. When the hearing resumed, defense counsel was in trial in another courtroom, and defendant was represented by counsel for codefendant Edillor. As no Tagalog interpreter was present,

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[4] This is perhaps a reference to codefendant Edillor.

the trial court took defendant's waiver of the right to an interpreter for this hearing only. The following colloquy occurred:

"The Court: [Defendant], do you speak relatively good English, even though your best language is Tagalog?

"[Defendant]: Yes, sir.

"The Court: Do you understand what I've been saying so far?

"[Defendant]: Yes, sir.

"……..

"The Court: [Defendant], you are entitled to have an interpreter with your best language, just for this hearing where we are going to have a short continuance, is that agreeable we go without the interpreter for you?

"[Defendant]: Yes.

"The Court: [Defendant], you do that understanding what I'm saying; is that true?

"[Defendant]: Yes, sir.

"The Court: Is that okay with you, [codefendant's counsel]?

"[Codefendant's counsel]: Yes.

"The Court: And we will do this case only for today without the interpreter, and in the future, we will get an interpreter."

No further reference to an interpreter was made throughout the case. Defendant appeared at later hearings, testified in English at the motion to quash and at trial, and never requested the assistance of an interpreter.

B. Law

To meet the initial burden on habeas corpus, the petitioner must establish a prima facie case for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) California Constitution, article I, section 14 provides, in pertinent part: "A person unable to understand English who is charged with a crime has a right to an interpreter throughout

the proceedings." "The prerequisite to an appointment of an interpreter is . . . that the person charged with a crime be 'unable to understand English,' not that he demand an interpreter." (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1453.) "[W]hen the ability of one charged with a crime to understand English is being evaluated at the outset of the proceedings, the burden is on the accused to show that his understanding of English is not sufficient to allow him to understand the nature of the proceedings and to intelligently participate in his defense." (*Id.* at p. 1454.) The trial court's decision regarding the defendant's ability to understand English is reviewed for abuse of discretion. (*Id.* at p. 1456.) A defendant entitled to the services of an interpreter can waive an interpreter, but such a waiver must be affirmatively shown to be intelligent and voluntary. (*People v. Aguilar* (1984) 35 Cal.3d 785, 794.)

C. Discussion

Defendant contends that the trial court affirmatively found she was entitled to the services of an interpreter, and that the failure to either provide an interpreter or obtain her waiver is error. Alternatively, defendant contends the record, and additional evidence she presented with her petition for habeas corpus, establishes her entitlement to an interpreter.

1. Trial Court's Finding

Defendant contends the trial court's statement on May 2, 2003, that she would be provided with an interpreter at subsequent proceedings was an affirmative finding that defendant required the services of an interpreter. We disagree. Although it is true that the trial court represented an interpreter would be provided, the trial court made no finding that defendant was unable to understand English. Indeed, the trial court made no findings regarding defendant's ability to understand English.

The failure to subsequently appoint an interpreter encompassed an implicit finding defendant understood English. Such a finding did not constitute an abuse of discretion. On March 6, 2003, both defendant and her counsel represented defendant understood English and did not require an interpreter. On May 2, 2003, although defendant indicated a preference for Tagalog, she reaffirmed that she speaks "relatively good English." Defendant testified in English at the motion to suppress and at trial. The bulk of defendant's answers reflected a clear understanding of the questions asked by counsel. Defendant's testimony, particularly the testimony elicited by non-leading questions, indicates defendant understood English. At no point during the trial did defendant or defense counsel suggest defendant's limited knowledge of English required the appointment of an interpreter. The trial court did not abuse its discretion in concluding defendant understood English and did not require an interpreter.

2. Defendant's Entitlement to an Interpreter

Considering the entirety of the record at trial, combined with the additional evidence offered in support of the petition for habeas corpus, defendant has not established a prima facie case that she was entitled to an interpreter.

Defendant testified in English at trial. Defendant represented that she did not need an interpreter. Neither defendant nor her counsel requested an interpreter at trial. It is clear that defendant was able "to understand English." In her petition for habeas corpus, defendant supplements the record on appeal with declarations purporting to show defendant did not understand English. In light of the entire record demonstrating otherwise, this evidence fails to establish a prima facie case.

DISPOSITION

The judgment is modified to reflect a $50 state penalty assessment pursuant to Penal Code section 1464 and a $35 county penalty assessment pursuant to Government Code section 76000. The clerk of the superior court is directed to correct the abstract of judgment to reflect the penalty assessments and forward the corrected abstract of judgment to the Department of Corrections. As modified, the judgment is affirmed. Defendant's petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

GRIGNON, Acting P. J.

We concur:

ARMSTRONG, J.

MOSK, J.